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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1113

EDWARD ROSAS,
Petitioner,

VS.

STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The unpublished opinion of the California Superior Court filed April 25, 1977, granting in part and denying in part petitioner's motion to suppress evidence, is contained in the petition for certiorari at pp. 5-6.

The unpublished opinion of the California Court of Appeal filed August 24, 1978, which affirms that part of the Superior Court order denying petitioner's motion to suppress is attached as Appendix A to the petition for certiorari.

Hearing in the California Supreme Court was denied without opinion on October 18, 1978.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether an employee of an auto body shop has standing to object to a search of the open garage area of that business which is open to other employees and apparently the public?

2. Whether California Vehicle Code section 2805, which authorizes warrantless searches of auto body shops, is constitutional?

3. Whether California Vehicle Code section 2805 constitutionally justifies a warrantless search for a stolen car as well as a routine administrative inspection?

STATEMENT OF THE CASE

By information filed March 8, 1977, in Santa Clara County Superior Court, petitioner and several co-defendants were charged in Count I with violating California Vehicle Code section 10851 (auto theft) and in Count II with violating California Penal Code section 496 (receiving stolen property) (CT 1).[1] Petitioner pled not guilty the same day (CT 2).

[1]CT designates the state clerk's transcript on appeal; RT designates the state reporter's transcript on appeal. The motion to suppress evidence was submitted on the preliminary hearing transcript (RT 13) which is contained in the clerk's transcript.

On April 18 and 25, 1977, petitioner's motion to suppress evidence, allegedly obtained by an illegal search and seizure, under California Penal Code section 1538.5 was granted in part and denied in part (CT 169, 173-175).

On September 1, 1977, petitioner pled guilty to Count II and Count I was dismissed (CT 179). On November 3, 1977, petitioner was placed on probation (CT 182, 184).

The petition for certiorari was filed January 15, 1979.

STATEMENT OF FACTS

On the morning of January 6, 1977, Officer Dennis McKenzie of the San Jose Police Department auto theft detail received a phone call about an auto theft (CT 38). The stolen car was described as a bronze colored Datsun 260Z or 280Z, license number 781 PGV (CT 39). The informant stated the car was at co-defendant Mac Perez' Body Shop on San Jose Avenue (CT 39). The informant further stated the car was stolen from Downtown Datsun and that one Rezendes, a person named Ed, and two brothers were involved (CT 39-40, 73). Rezendes was said to drive a tow truck (CT 73).

The informant told Officer McKenzie that an associate of petitioner and his co-defendants had once tried to steal his car and petitioner and his co-defendants had broken his windows (CT 74). The informant gave his name and address (CT 47).

Officer McKenzie said the informant called to assist the police and had never been an informant before (CT 46). The informant had obtained the information by being present at the body shop (CT 82). He said the car was in the process of being cut up (CT 82). Officer McKenzie

called Downtown Datsun and confirmed a car fitting the stolen vehicle's description had in fact been stolen (CT 9, 11, 40).

After this confirmation, about 9:45 a.m., Officer McKenzie and five or six other San Jose police officers went to the Mac Perez Body Shop at 6 San Jose Avenue (CT 40-41, 76).

The shop was open for business (CT 40, 89) and Officer McKenzie opened the unlocked sliding garage door and entered (CT 44-45). No one had drawn guns (CT 76). Inside were petitioner and co-defendants Leonard Rezendes, Valentine Ferrell, and Mike Ferrell (CT 41-43). John Morgan was also present (CT 41). The garage measured approximately 90 feet by 40 to 50 feet (CT 87).

Officer McKenzie asked who was in charge and who was employed at the shop (CT 43). Everyone said they were employees and no one present was in charge (CT 43). Officer McKenzie declared he was going to check the premises pursuant to Vehicle Code section 2805 (CT 43, 48-49). He had no warrant of any kind (CT 44).

Checking all the cars, Officer McKenzie found the stolen Datsun in five minutes (CT 51, 84-86). It was cut up by a torch in quite a few sections (CT 51). The doors, front end, fenders, and top had been removed (CT 51). The car's engine was on a tow truck hook (CT 53). The truck had Leonard Rezendes' name on the driver's door (CT 53). The tow truck, inside the garage, also had the stolen transmission in the back (CT 54).

Another wrecked Datsun with extensive front end damage was also in the shop (CT 58). It also needed a new passenger door (CT 59). A door and the front end of the Datsun were placed right next to the corresponding parts of the other Datsun (CT 59). It is possible to replace the entire front end of these cars (CT 58-59).

Officer McKenzie entered the locked Body Shop office by using a screwdriver (CT 64). In the office he found a receipt for the non-stolen Datsun from Air Auto Salvage, a consumer affairs sticker showing the shop belonged to co-defendant Perez and was subject to Vehicle Code section 2805, and some other items, all of which were ordered suppressed (CT 61, 91). Petitioner and his co-defendants were arrested (CT 70).

John Morgan works at Collection Bureau of San Jose (CT 16). In business dealings with co-defendant Perez, Morgan would give Perez money to buy damaged cars which he would repair and they would then split the profits of a sale (CT 16, 19-21). Morgan gave Perez money to buy from Air Auto Salvage the other Datsun found at the shop (CT 17-18).

As part of his duties, Officer McKenzie routinely checks repair shops once or twice a week pursuant to Vehicle Code section 2805 (CT 83, 97).

At the police station, the Ferrells were placed in a room by themselves where a tape recorder monitored their conversation (CT 70-71). In conversation, with Valentine Ferrell doing most of the talking, it was stated only one person could place them with the Datsun, he was not going to

testify, so they would just deny being there (CT 71-72). Valentine said they should have gotten rid of the car the previous evening (CT 72).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Amendment XIV, section 1: " . . . No state shall . . . deprive any person of life, liberty, or property without due process of law . . ."

SUMMARY OF ARGUMENT

Petitioner has no standing to object to the search because he had no reasonable expectation of privacy in the open garage area of his employer's auto body shop. In any event, California Vehicle Code section 2805 as applied here constitutionally permits warrantless searches of auto body shops during business hours. People involved in the auto body shop business are engaged in a discrete industry which is pervasively regulated and in effect consent to warrantless searches. Moreover, the governmental interests involved, prevention of trafficking in stolen vehicles, maintaining vehicle safety, and protection of consumers, are great. A warrant requirement would frustrate government regulation here because of the automobile's mobility and the easy alteration of vehicle numbers and papers.

Finally, if California Vehicle Code section 2805 constitutionally permits routine warrantless administrative searches, it was not unconstitutionally used to search where a tip indicated specific criminal activity was afoot.

ARGUMENT

I

PETITIONER HAS NO STANDING TO OBJECT TO THE WARRANTLESS SEARCH OF THE OPEN GARAGE AREA OF HIS EMPLOYER'S AUTO BODY SHOP.

In *Jones v. United States*, 362 U.S. 257 (1960), this Court posited two ways a defendant could show he had the necessary standing to challenge a search.

One way was where the same possession needed to establish standing was an essential element of the crime charged. In such a case, the defendant's standing was said to be "automatic," because it was deemed unfair to force him to testify to possession in order to show standing and then permit the prosecution to use that testimony to convict. *Jones v. United States, supra*, at 261-265. Both for the self-incrimination dilemma of the defendant and the vice of permitting the Government to take contradictory positions (i.e., charging possession as part of the crime and denying it for standing purposes), standing was deemed satisfied. *Jones v. United States, supra*, at 261-265; *Brown v. United States*, 411 U.S. 223, 227-229 (1973).

The other method required the defendant to show he was "legitimately on the premises where a search occurs" to establish standing. *Jones v. United States, supra*, at 267.

Petitioner here qualifies for standing to challenge the present search on both grounds. Receiving stolen property, a crime with which he was charged and pled guilty to, is a possessory crime, establishing "automatic" standing under *Jones*. The crime was alleged to have occurred on the day of the search. See, *Brown v. United States, supra,* at 228. In addition, as an apparent employee of the body shop, he was "legitimately on the premises" when it was open for business.

However, in *Rakas v. Illinois,* ..... U.S. ....., 58 L. Ed.2d 387 (1978), this Court eliminated the separate standing analysis for determining whether a defendant may raise a Fourth Amendment claim and subsumed it within substantive search and seizure law. *Id.* at ..... U.S. ....., 58 L.Ed.2d 398-399. Because Fourth Amendment rights are personal,[2] and may be invoked only by those whose own protection was infringed by the search and seizure, *Simmons v. United States,* 390 U.S. 377, 389 (1968); *Alderman v. United States,* 394 U.S. 165, 174 (1969), this Court held the proper analysis is not whether the defendant has standing, but:

> "whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed.2d 387, 399.

[2]As distinguished from the right to invoke the Exclusionary Rule. Cf. *Stone v. Powell,* 429 U.S. 465, 486 (1976).

This Court then specifically rejected the "legitimately on the premises" rational of *Jones* as "too broad a gauge for measurement of Fourth Amendment rights." [Footnote omitted]. *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed. 2d 387, 400. *Jones* was limited to its facts, *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed.2d 387, 491, confining it to "the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." *Rakas v. Illinois, supra,* ..... U.S. ....., 58 L.Ed.2d 387, 400.

Instead of the separate *Jones* standing analysis, the focus is now on the scope of the defendant's substantive protection under the Fourth Amendment, which is dependent "upon whether the defendant who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois, supra,* at 401; *Katz v. United States,* 389 U.S. 347, 353 (1967).

Bearing the new rule of *Rakas* in mind, petitioner had no expectation of privacy in the body shop garage of his employer. He asserted neither a property nor a possessory interest in the garage, nor any interest in the property seized. The latter property was shown to be owned by Downtown Datsun and the former by co-defendant Mac Perez. The garage was a large open area, about 90 feet long and 40 to 50 feet wide. The sliding entrance door, though closed, was not locked. The shop was open for business. The stolen vehicle was out in the open, in full view, partially on a tow truck owned by a co-defendant. Petitioner could have no expectation of privacy in the garage

or on his co-defendant's truck. Petitioner's claim must fail as not cognizable.

The "automatic" standing rule of *Jones* is of no aid to petitioner in light of *Rakas*. The clear implication of *Rakas* is that a legitimate expectation of privacy must be shown in order to have a cognizable Fourth Amendment claim. Absent that legitimate expectation of privacy, it is of no import that the crime charged is possessory, for there is no interest the defendant has which the Fourth Amendment was designed to protect.

II

CALIFORNIA VEHICLE CODE SECTION 2805 IS CONSTITUTIONAL.

At the time of petitioner's offense, California Vehicle Code section 2805 stated:[3]

> "A member of the California Highway Patrol may inspect any vehicle of a type required to be registered under this code on a highway or in any public garage, repair shop, parking lot, used car lot, automobile dismantlers lot, or other similar establishment, for the purpose of locating stolen vehicles, investigating the title and registration of vehicles, or inspection of vehicles wrecked or dismantled."

Petitioner contends the statute is unconstitutional because "it does not meet the balancing tests set forth by the United States Supreme Court and because it is not properly limited in time, place, and manner." Pet. at 8.

[3]The section has since been amended and the revised statute appears in the petition at p. 3, n. 1.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), this Court, overruling contrary precedent, held that statutes authorizing warrantless administrative searches for municipal fire, health and housing inspections were unconstitutional. A search warrant, albeit one that could be obtained without traditional criminal probable cause, was held to be required to conduct these kinds of searches. *Camara v. Municipal Court, supra*, at 534.

In *See v. City of Seattle, supra*, this Court carefully pointed out that it was not implying:

> "that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness." *Id.* at 546.

Subsequently, in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), this Court found exceptions to the warrant requirement of *Camara* and *See*. Noting that *Camara* and *See* left undecided the reach of the Fourth Amendment with respect to various regulatory statutes, *Colonnade Catering Corp. v. United States, supra*, at 76-77; *United States v. Biswell, supra*, at 313, the Court in each case upheld statutes authorizing warrantless searches.

In *Colonnade*, the statute provided for warrantless inspection of retail liquor dealers. The Court held that be-

cause of the long history of pervasive regulation of the liquor business, warrantless searches were reasonable under the Fourth Amendment. *Colonnade Catering Corp. v. United States, supra,* at 75-76.

In *Biswell,* the statute provided for warrantless inspection of firearms and ammunition dealers. The Court held that although the regulation of interstate traffic in firearms was not as deeply rooted in history as was the case with liquor, firearms control for the purpose of preventing violent crime was a significantly large interest which would be frustrated by the requirement of a warrant. *United States v. Biswell, supra,* at 315-316. The Court further noted that warrantless inspections pose only a limited intrusion on the dealer's privacy because he knows, when he chose to enter a pervasively regulated business, that his premises and records will be open for inspection. *United States v. Biswell, supra,* at 316.

In the present case, we also deal with a pervasively regulated industry. California has an entire code devoted to vehicles, and examination of it "discloses elaborate provisions for the registration and licensing of such businesses, designed to segregate the honest business man from the thief and the fence [footnote omitted]." *People v. Grey,* 23 Cal.App.3d 456, 461 (1972). Automotive repair shops are particular subjects of close regulation, California Business and Professions Code sections 9880 et seq., and must make their records open for reasonable inspections. California Business and Professions Code section 9884.11. As noted in *People v. Grey, supra,* car dismantling businesses and related activity are "frequently utilized as a 'front' by per-

sons engaged in the very kind of illegal business herein involved." *People v. Grey, supra,* at 461.

Moreover, unsafe automobiles can be as dangerous as firearms. The state has a legitimate governmental interest in seeing that consumers receive only those repairs which are necessary and at a fair price, in preventing trafficking in stolen vehicles and their parts and also in seeing that unsafe vehicles are not placed on public thoroughfares.

It is true, as with the firearms of *Biswell* and unlike the liquor of *Colonnade,* automobile regulation is not deeply rooted in history. But like firearms, automobiles have always been pervasively regulated. Since automobiles are a creature only of the twentieth century, regulation of them is necessarily limited to that time.

Petitioner places heavy reliance on this Court's recent decision in *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978). In that case this Court held that the Occupational Safety and Health Act (OSHA) was unconstitutional to the extent that it authorized warrantless searches. *Marshall v. Barlow's, Inc., supra,* at 325. The Court held that simply because a business was engaged in interstate commerce and subject to regulation as to employee wages and hours did not make it a closely regulated industry of the kind in *Colonnade* and *Biswell. Marshall v. Barlow's, Inc., supra,* at 313-314.

> "'A central difference between those cases [*Colonnade* and *Biswell*] and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burden as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman

in a regulated industry in effect consents to the restrictions placed upon him.'" *Marshall v. Barlow's, Inc., supra,* at 313, quoting from *Almeida-Sanchez v. United States,* 413 U.S. 266, 271 (1973).

Marshall v. Barlow's Inc., supra, is distinguishable not only because the regulation there involved was not pervasive enough to justify constructive consent to search, but also because the regulation was not limited to one type of business such as firearms, liquor, or, as here automobiles. The regulations sought to justify consent to search were those applied to all businesses engaged in interstate commerce. *Marshall v. Barlow's Inc., supra,* at 313-314. If warrantless searches were upheld on that basis, they would be the rule rather than the exception. *Marshall v. Barlow's Inc., supra,* at 313.

Statutes limited to discrete businesses, where regulation is pervasive, would still fall under the *Colonnade-Biswell* exception. *Marshall v. Barlow's Inc., supra,* at 321.

The enforcement needs of vehicle regulation require warrantless searches. In *Marshall v. Barlow's Inc., supra,* at 315-321, this Court found that the warrant requirement would not render enforcement of OSHA regulations ineffective. But with automobiles, which occupy a special category in Fourth Amendment case law, due, *inter alia,* to their quick mobility and registration requirements, *Marshall v. Barlow's, Inc., supra,* at 315 n. 10, the need for warrantless inspection is great. The vehicle otherwise can easily be moved and registration numbers can be altered and papers forged. As noted in *South Dakota v. Opperman,* 428 U.S. 364, 367-368 n. 2 (1976):

"In *Camara v. Municipal Court* [citation omitted], and *See v. City of Seattle* [citation omitted], the court held that a warrant was required to effect an unconsented administrative entry and inspection of private dwellings or commercial premises to ascertain health or safety conditions. In contrast, this procedure has never been held applicable to automobile inspections for safety purposes." See also, *United States v. Martinez-Fuerte,* 428 U.S. 543, 560 n. 14 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 883 n. 8 (1975); *People v. Nunn,* 264 Cal.App.2d 919, 922 (1968).

As to the lack of any statutory limits on the time, place, and scope of the search, petitioner is hardly in a position to complain. The search here took place while the shop was open for business and it is not alleged that it was not carried out in an orderly, non-disruptive manner. The statutes in *Colonnade* specified only that entry be made during the day, during business hours, or at night if the premises were then open, for the purpose of examining the records required to be kept and articles subject to tax. *Colonnade Catering Corp. v. United States, supra,* at 73 n. 1, 2. The statute in *Biswell* provided only that entry be during business hours for the purpose of examining records required to be kept and firearms and ammunition stored on the premises. *United States v. Biswell, supra,* at 312 n. 1. While the present statute does not specify that entry be made during business hours, since such entry was in fact made then, petitioner has no basis for complaint. In all other respects, there is no material difference between California Vehicle Code section 2805 and the statutes upheld in *Colonnade* and *Biswell* as to the time, place, and scope of the search.

To reiterate, this case involves a pervasively regulated subject under which people who choose to enter the business are fully aware of warrantless search provisions. The regulation covers a discrete subject, not applicable to every business. The need for warrantless inspection is great both because the automobile is easily moved and the interests at stake are large. The statute in question therefore comes within the *Colonnade-Biswell* exception to the warrant requirement.

III

IF CALIFORNIA VEHICLE CODE SECTION 2805 CONSTITUTIONALLY PERMITS ROUTINE WARRANTLESS ADMINISTRATIVE SEARCHES, IT ALSO CONSTITUTIONALLY PERMITS A SEARCH WHERE A SPECIFIC TIP INDICATES THAT CRIMINAL ACTIVITY IS AFOOT.

Petitioner contends even if California Vehicle Code section 2805 constitutionally authorizes routine warrantless administrative searches of auto body shops, the present search was unconstitutional because it was used to investigate a specific tip that criminal activity was afoot.

It seems to us absurd that searches which can be conducted on no evidence whatsoever become invalid when the police have some information in their possession that a crime may be taking place. To say that the police were searching for evidence of a crime rather than administrative compliance is of no help to petitioner, for lack of administrative compliance is invariably itself a crime. *Camara v. Municipal Court, supra,* at 531.

United States v. Anile, 352 F. Supp. 14 (N.D.W.V. 1973), relied on by petitioner, is distinguishable and unpersuasive. In *Anile* there were four warrantless searches over the course of two and one-half months, hardly the situation here.

In addition, as noted in *People v. Curco Drugs,* 76 Misc. 2d 222, 350 N.Y.S.2d 74, 84 (1973), which refused to follow *Anile,* the petitioner knew in advance that his premises were liable to warrantless searches and it "would be a meaningless formality" to require a warrant to search premises which by statute the police may search anyhow.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied.

Dated, April 10, 1979.

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